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SHORT-FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. PHYLLIS ORLIKOFF FLUG, IA Part 9  
Justice

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FOGARTY BROS., INC.,	Index Number..18258/93
Plaintiff,	Motion Date...5/1/01
-against-	Motion Cal.
THE CITY OF NEW YORK and ALLBORO	Number.....21
PAVING CORP.,	
Defendant.	

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The following papers numbered 1 to 7 read on this motion

Notice of Motion	1 - 2
Memo of Law in Support	3
Notice of Cross-Motion	4 - 5
Affirmation in Opposition	6
Reply Affirmation	7

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The defendant, City of New York, has moved for an order granting it summary judgment dismissing the complaint and cross-claim as against it, on the ground that the plaintiff did not comply with the notice of claim requirements in General Municipal Law (GML) §§50-e and 50-i and on the further ground that neither defendant owed a duty to the plaintiff. The defendant, All Boro Paving Corp, has cross-moved for the same relief.

This action is based upon economic loss: lost business caused by reduced traffic flow and parking availability during a delayed City roadway construction project. No associated personal injury or property damage is alleged. The complaint alleges three causes of action: negligence, continuing trespass and continuing nuisance. The complaint also alleges a fourth cause of action for punitive damages.

The defendant, City, awarded a contract to the defendant, All Boro, for the reconstruction of a section of Liberty Avenue, between the Van Wyck Expressway and Farmers Boulevard, Queens County. Work on the project began July 20, 1987, with a two-year

period for completion scheduled in the contract. However, due to various delays, including sewer rehabilitation, the work was not completed until mid-July 1993, when permanent asphaltting was done. The plaintiff, an auto parts dealer, who's store is and was located on Liberty Avenue within the project limits, seeks no damages beyond that point.

GML §50-i provides in pertinent part:

1. No action or special proceeding shall be prosecuted or maintained against a city, ...for personal injury, wrongful death or damages to have been sustained by reason of the negligence or wrongful act of such city ...,\* unless (a) a Notice of Claim shall have been made upon the city ..., and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based..."

Under GML §50-e such Notice of Claim must be served within 90 days after the claim arose.

GML §50-e (5) allows a claimant to move for an extension and to file a late Notice of claim. The extension ,may not exceed the statutory limitation period in GML §50-e, of "one year and ninety days after the beginning of the event upon which the claim is based."

In this action the project was completed in 1993. No notice of claim has been served. The limitation period has long since run. The plaintiff's argument that the City waived service of a notice is without merit. Service of a summons and complaint does not constitute a valid notice of claim. (Davidson v. Bronx Municipal Hospital, 64 NY2d 59, 62 [1984]; oral complaints made to the DOT's staff are insufficient, since they must be in a sworn writing (GML §50-e [2]) upon the person designated by law as one to whom a summons may be delivered (GML §50-e [3][a]); and knowledge of the claim does not constitute compliance with the notice of claim requirements (Camarella v. East Irondequoit Central School Board, 34 NY2d 139, 142 [1974]; Mark v. Board of Education of the City of New York, 255 AD2d 586, 586-587 [2d Dept 1998])). Further, a public corporation neither waives, nor is it estopped from demanding compliance with the notice of claim requirements because of mere negotiations, promises to investigate, or expressions of willingness to or hope of settlement (Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966, 968 [1988]; Krugman & Fox Corp. v. Elite Associates, Inc., 167 AD2d 514, 515-516 [2d Dept. 1990],

app. denied 77 NY2d 806 [1991]).

Finally, this Court rejects the argument that since the plaintiff seeks injunctive relief along with monetary damages, a notice of claim is not necessary. The injunctive relief is illusory since the only relief at issue is the monetary damages. The alleged nuisance and trespass ended one month before this action was brought.

In view of the foregoing, the motion for summary judgment by the City of New York is granted.

The Court now turns to the defendant All Boro's motion for identical relief. The gravamen of the action against All Boro is the negligent performance of a public contract resulting in economic loss. This argument, if accepted, would lead to potentially uncontrollable liability. The claim that its business was reduced due to fewer customers using Liberty Avenue is one that could be made by every other business in the area. There is no evidence offered to establish privity of contract between the plaintiff and either or both of the defendants. Nor has the plaintiff proved any unique injury or deprivation of some special right (see, Milliken Co., v. Consolidated Edison Company of New York and the City of New York, et al. 84 NY2d 469 [1994]; Goldberg, Weprin & Yitin, LLP v. Tishman Construction Corp., 275 AD2d 614 [1<sup>st</sup> Dept., 2000]).

There is no privity because, at most, the plaintiff was an incidental beneficiary of the contract rather than a third-party beneficiary (Milliken & Co. v. Consolidated Edison Company of New York and the City of New York, supra, at 478). There is no cause of action against either defendant, directly as a third-party beneficiary or indirectly, in tort (Pizzaro v. City of New York, et al, 188 AD2d 591 [2d Dept. 1992], app. denied 82 NY2d 656 [1993]).

There is no special right or particular duty owed because the road work was not performed for the movant's sole benefit but for the public as a whole. (H.R. Moch Comapny, Inc. v. Rensselaer Water Company, 247 NY 160, 165-166 [1928]). As against the City, its agent must have, inter alia, made promises directly to the plaintiff or engaged in direct actions that would constitute an affirmative duty to act on the plaintiff's behalf and it must have justifiably relied thereon to its detriment in order to establish a special relationship (Laver v. City of New York, 95 NY2d 95, 101 [2000]).

Nor did the plaintiff enter into a professional, fiduciary or other relationship with the defendants such as would constitute the functional equivalent of priority (cf, Ossining Union Free School District v. Anderson LaRocca Anderson, 73 NY2d 417, 425 [1989]).

Absent priority or other such special circumstances, parties to a contract owe no duty in tort to third parties for the negligent performance of contractual obligations (H.R. Moch Company, Inc. v. Rensselaer Water Company, supra; Strauss v. Belle Realty Co., 65 NY2d 399, 402 [1985]). In view of the foregoing neither defendant owes a duty to the movant and summary judgment is appropriate as to both. The motions are granted.

May 9, 2001

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J.S.C.